IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 28/3/2018
C O R A M
THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE M.GOVINDARAJ

Writ Petition No.7088 of 2018

1. K.Jayasree
Proprietor of Santhoshi Associates
W/o. N. Karuppusamy.

2. N. Karuppursamy ... Petitioners

Vs

The Authorised Officer
Indian Overseas Bank
Door No.1420 Trichy Road
Vincent Buildings
Coimbatore 641 018. ... Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorarified mandamus, to call for the records pertaining to the sale notice of immovable secured assets in ARMB/247/2017-2017, dated 29/1/2018 of the respondent and quash the same and subsequently, direct the respondent to return back the first petitioner's original property documents to the first petitioner by receiving the balance due amount of Rs.30,50,000/-.

For Petitioners ... Mr.D.R.Arunkumar

O R D E R

(Order of the Court was made by S.MANIKUMAR, J)

Mrs.K.Jayasree, Proprietor of Santhoshi Associates, first petitioner is the borrower. Second petitioner, husband is the guarantor. They have availed loan. Offered immovable property as security by depositing title deeds, on 25/4/2011 and that the same was registered as Document No.2026 of 2011, on the file of the Joint - II, Sub-Registrar, Coimbatore. Petitioners have once again constructively deposited other title documents, on 19/1/2012 and created a registered supplemental memorandum of deposit of title deeds, bearing No.2380 of 2012, at Joint - II, Sub-Registrar Office, Coimbatore. They did not repay the amount as contracted. Indian Bank, Coimbatore, respondent herein, has filed O.A.No.239 of 2016, on the file of the Debts Recovery

Tribunal, Coimbatore. Tribunal has referred the matter to Lok Adalat, for amicable settlement and on 9/2/2017, an award was passed by the Debts Recovery Tribunal Lok Adalat in O.A.No.239 of 2016. Details of which are extracted hereunder:-

> "3. That if the defendant(s) commits default to pay any one of the instalment stated at 'a', 'b' & 'c' as agreed which is stated in clause (2), above then the defendant(s)/borrower(s)/guarantor(s) is/are jointly and severally be liable to pay to the applicant Bank the entire claim amount due as mentioned in clause (1), till date of realisation and less the amount paid after this award and the Hon'ble Presiding Officer will issue the recovery certificate under Section 19-Sub-Sec.22 of the Act 51 of 1993 for recovery of the amount debt specified in the said certificate.
>
> 4. Thereafter, the applicant Bank is entitled to bring the schedule mentioned property/security for sale, for recovery of the amount due under clause 1 read with Clause 3 above and for the balance if any, the plaintiff is entitled to recover it from the defendants personally and from his/her other Assets, with costs.
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> 5. It is ordered that Court fees paid by the applicant bank in the said case shall be refunded to the said applicant Bank in accordance with the DRT Refund of Court Fee Rules, 2013.
>
> 6. The Bank is directed to return back the entire documents to the borrower after full and final settlement without any delay.

2. According to the petitioners, as per the Lok Adalat Award, first instalment of Rs.5 lakhs was paid by them, on 30/3/2017 and that the next instalment of Rs.31,50,000/-, could not be paid on or before 31/7/2017. As the petitioners are engaged in real estate and construction business, which became dull, they could not make the second instalment.

3. Thereafter, petitioners have paid Rs.1 lakh to the Bank and sought for extension of time till 31/12/2017, to make the remaining amount of Rs.30,50,000/-. The first petitioner also became ill. Even without issuing notice to the petitioners, Bank has affixed sale notice, dated 29/1/2018, on the immovable property. Being aggrieved, instant writ petition is filed, on the grounds of violation of principles of natural justice and non-adherence to Rule 9 (1) of the Security Interest (Enforcement) Rules, 2002.

4. Added further, Mr.D.R.Arun Kumar, learned counsel for the petitioners submitted that the remaining amount of Rs.30,50,000/-, as per the award would be paid within one week and on the above said grounds, prayed to entertain the writ petition and for appropriate interim orders.

5. Heard Mr.D.R.Arunkumar, learned counsel for the petitioners.

6. Rule 9 (1) of the Security Interest (Enforcement) Rules, 2002, state thus:-

> "Time of sale, issue of sale certificate and delivery of possession, etc.
>
> (1). No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.
>
> Provided further that if sale of immovable property by any one of the methods specified by sub-rule (5) of Rule 8 fails and sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower, for any subsequent sale.
>
> (2). The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:
>
> Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of Rule 8:
>
> Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.
>
> 3. On every sale of immovable property, the purchaser shall immediately, i.e., on the same day or not later than next working day, as the case may be, pay a deposit of twenty five per cent of the amount of the sale

price, which is inclusive of earnest money deposited, if any, to the authorised officer conducting the sale and in default of such deposit, the property shall be sold again.

4. The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.

5. In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit (to the secured creditor) all claim to the property or to any part of the sum for which it may be subsequently sold.

6. On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

7. Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him:

[Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to be purchaser within fifteen days from the date of finalisation of the sale.]

8. On such deposit of money for discharge of the encumbrances, the authorised officer shall issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

9. The authorised officer shall deliver

the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

10. The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.""

7. For violation of principles of natural justice or non-adherence to the above said Rule, petitioners can always approach the forum created under the Security Interest (Enforcement) Rules, 2002, for filing an application under section 17 (1) of the Act.

8 (i). In Precision Fastenings v. State Bank of Mysore, reported in 2010(2) LW 86, this Court held as follows:

> "This Court has repeatedly held in a number of decisions right from the decision in Division Electronics Ltd. v. Indian Bank (DB) Markandey Katju, C.J., (2005 (3) C.T.C., 513), that the remedy of the aggrieved party as against the notice issued under Section 13(4) of SARFAESI Act is to approach the appropriate Tribunal and the writ petition is not maintainable. The same position has been succinctly stated by the Hon'ble the Supreme Court in Transcore v. Union Of India (2006 (5) C.T.C. 753) in paragraph No. 26 wherein the Supreme Court has held as under:—
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> "The Tribunal under the DRT Act is also the Tribunal under the NPA Act. Under Section 19 of the DRT Act read with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993 (1993 Rules), the applicant bank or FI has to pay fees for filing such application to DRT under the DRT Act and, similarly, a borrower, aggrieved by an action under Section 13(4) of NPA Act was entitled to prefer an Application to the DRT under Section 17 of NPA." (Emphasis added) "

(ii) In Union Bank of India v. Satyawati Tondon, reported in 2010 (5) LW 193 (SC), the Hon'ble Apex Court has held as follows:

"16. The facts of the present case show that even after receipt of notices under Section 13(2) and (4) and order passed under Section 14 of the SARFAESI Act, respondent Nos. 1 and 2 did not bother to pay the outstanding dues. Only a paltry amount of Rs. 50,000/- was paid by respondent No. 1 on 29.10.2007. She did give an undertaking to pay the balance amount in installments but did not honour her commitment. Therefore, the action taken by the appellant for recovery of its dues by issuing notices under Section 13(2) and 13(4) and by filing an application under Section 14 cannot be faulted on any legally permissible ground and, in our view, the Division Bench of the High Court committed serious error by entertaining the writ petition of respondent No. 1.

17. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also

envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for re-dressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out

in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1=1999-2-L.W. 200 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

28. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act.

29. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

(iii) In Saraspathy Sundararaj v. Authorised Officer and Assistant General Manager, State Bank of India, reported in (2010) 5 LW 560, the Court held as follows:

"The petitioner has filed this writ petition praying for a Writ of Certiorarified Mandamus calling for the records relating to the possession notice dated 16.09.2004 issued by the respondent under the SARFAESI Act and consequently direct the respondent to effect the settlement in accordance with the SBI OTS-SME 2010 Scheme as contained in its letter dated 18.03.2010 and unconditionally restore physical possession of the six rooms taken physical possession by it at No. 29, Sarojini Street, T. Nagar, Chennai - 17 with such damages.

... When a specific forum has been created which enables the borrower to challenge the action of the financial institution by filing necessary petition under Section 17, the petitioner is not entitled to invoke the writ jurisdiction of this Court. What could not be achieved by the petitioner by filing a petition before the appropriate Forum, which is at present barred by period of limitation, could not be permitted to be achieved by extending the jurisdiction conferred to this Court under Article 226 of The Constitution of India. Above all, since the petitioner has violated the terms and conditions of the loan by transferring the property in favour of her son, this Court is not inclined to entertain the petition....”

iv) Even issuance of sale certificate can be questioned. In Simon's Foot Wear Pvt. Ltd. v. Indian Bank, reported in (2015) 2 MLJ 166, a Hon'ble Division Bench of this court held as follows:

“9.As against the confirmation of sale and issuance of the sale certificate, the writ petitioners did have their remedy of filing an appeal under Section 18 of the SARFAESI Act before the Debts Recovery Appellate Tribunal. The appeal remedy is an effective and efficacious remedy. When such an effective and efficacious remedy is available, this court will decline exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. ....

10.So far as the challenge made to the order dated 24.06.2013 is concerned, since an appeal remedy is available the writ petitioners ought to have exhausted the appeal remedy before approaching this Court with this writ petition. ....”

9. Petitioners have the remedy under Section 17 (1) of the SARFAESI Act, 2002. For the above said reasons, even if sale certificate is issued, the same can be challenged. In the light of the above decisions and discussion, we are not inclined to entertain the writ petition and accordingly, the same is dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

mvs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

+1cc to Dr.Arunkumar, Advocate SR.No.23794

Copy to:The Section Officer,
ER Section,
High Court, Madras
(for nature of sale notice dt.29.1.2018
to the learned counsel for the petitioner)

MR(CO)
sm:8.5.2018

Writ Petition No.7088 of 2018